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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:) CC Docket Nos. 98-147, 98-11,
) 98-26, 98-32, 98-15, 98-78,
Deployment of Wireline Services Offering) 98-91, CCB/CPD No. 98-15,
and Telecommunications Capability, *et al.*) RM 9244

COMMENTS OF GTE

GTE Service Corporation and its below-listed affiliates¹ (collectively "GTE"), pursuant to Sections 1.106(g) and 1.4(h) of the Commission's Rules, respectfully submit their comments supporting the Petitions for Reconsideration and/or Clarification filed by Bell Atlantic and the SBC companies on September 8, 1998 with respect to the Commission's Memorandum Opinion and Order, FCC 98-188.²

In their petitions, Bell Atlantic and SBC raise two issues: (1) whether the Commission may lawfully require incumbent local exchange carriers ("ILECs") to provide competitors with superior quality loops; and (2) whether Section 706 of the

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc., GTE Communications Corporation, GTE Wireless Incorporated, GTE Media Ventures Incorporated, and GTE Internetworking.

² *Advanced Services MO&O.*

1996 Act³ provides independent authority for the Commission to forbear from applying the Act's requirements with respect to advanced services. In the *Advanced Services MO&O*, the Commission found, contrary to the court's determination in *Iowa Utilities Board*,⁴ that ILECs may be required to provide superior quality loops to competitors.⁵ The Commission also found that it lacked authority under Section 706 to forbear from the Act's requirements with respect to advanced services.⁶ Both findings are plainly wrong as a matter of law and should be expeditiously reconsidered and corrected.

I. WHILE ILECs MAY VOLUNTARILY AGREE TO PROVIDE LOOP CONDITIONING TO COMPETITORS, THE COMMISSION MAY NOT LAWFULLY REQUIRE SUCH CONDITIONING.

The *Advanced Services MO&O* granted ALTS' petition for a declaratory ruling opining that Section 251(c)(3) of the Act requires ILECs to provide loop conditioning on a non-voluntary basis.⁷ The Commission cited itself for this proposition, finding that it had determined in the *Local Competition Order* that ILECs must "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not

³ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), *codified beginning at* 47 U.S.C. § 153. All references to the "Act" are to the Communications Act of 1934, as amended by the 1996 Act.

⁴ *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, Nos. 97-826, etc. (U.S. January 26, 1998).

⁵ *Advanced Services MO&O*, ¶¶ 18, 53-54.

⁶ *Id.*, ¶¶ 12, 18, 69-78.

⁷ *Id.*, ¶ 52. GTE notes that in many instances ILECs (including the GTE telephone operating companies) have undertaken the voluntary obligation to provide loop conditioning for requesting competitors on a nondiscriminatory basis. GTE does not view a grant of the instant petitions to alter such contractual obligations.

currently provided over such facilities.”⁸ More specifically, the Commission stated that “The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop.”⁹

To the extent the Commission’s Paragraph 53 determinations may be read to require non-voluntary loop conditioning in geographic areas in which an ILEC does not provide such conditioning for itself or its affiliates, it is in direct contravention of *Iowa Utilities Board* and may not stand. In contrast, GTE does not challenge a reading of Paragraph 53 that simply concludes that if an ILEC is providing loop conditioning for itself in a geographic area, but has not yet conditioned a *particular loop* in that area, then the ILEC may not deny loop conditioning requested by its competitor for that particular loop. This distinction is best evidenced by the following real-life situation:

Example 1: A number of ILECs are offering ADSL service in certain geographic areas, generally on a central office-by-central office basis. If a customer (e.g., an ISP) requests ADSL service to be provisioned to an end user served by an ADSL-deployed central office, the ILEC will, at the customer’s request (and expense), condition the end

⁸ *Id.*, ¶ 53 & n. 96, citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”), stay granted sub nom. *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), further *aff’d in part and vacated in part, as amended on partial reh’g.*, sub nom. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), further vacated in part sub nom. *California Public Utilities Comm’n v. FCC*, 124 F.3d 934 (8th Cir. 1997),), writ of mandamus issued sub nom. *Iowa Utilities Board v. FCC*, 135 F.3d 535 (8th Cir.), cert. granted sub nom. *AT&T Corp. v. Iowa Utilities Board*, Nos. 97-826, etc. (U.S. January 26, 1998).

⁹ *Id.*, ¶ 53.

user's loop for ADSL service if it is technically possible to do so. In this situation, it is permissible under the Act to require the ILEC to similarly provide loop conditioning to end user customers of competitors served by that same ADSL-deployed central office. In other words, such conditioning does not constitute a superior quality obligation imposed upon the ILEC or require the ILEC to provide "yet unbuilt superior"¹⁰ facilities to a competitor. In contrast,

Example 2: There will be a number of geographic (*i.e.*, central office-based) areas where an ILEC will not deploy ADSL (or any other advanced service), and therefore will not be providing loop conditioning to itself. If a competitor requests loop conditioning for an end user in these areas – where the ILEC is not providing loop conditioning for itself or any affiliate – the ILEC may not lawfully be required to provide such conditioning to competitors on a non-voluntary basis. Such conditioning would constitute a superior quality obligation imposed upon the ILEC and mandate that the ILEC provide "yet unbuilt superior" facilities to a competitor.

In their petitions, Bell Atlantic and SBC amply demonstrate that, as a matter of law, the Commission may not require loop conditioning in the circumstances described in Example 2, above. Section 251(c)(3) imposes no obligation on ILECs "to cater to every desire of every requesting carrier,"¹¹ and particularly through the non-voluntary provision of services or upgrade of existing facilities which the ILEC does not provide to itself.

¹⁰ *Iowa Utilities Board*, 120 F.2d at 813.

¹¹ Bell Atlantic petition, at 3, *quoting Iowa Utilities Board*, 120 F.3d at 8132-13.

[S]ubsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to network elements upon demand. ...

While the phrase “at least equal in quality” leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal – not superior. In other words, it establishes a floor below which the quality of the interconnection cannot go. ...

[S]ubsection 251(c)(3) implicitly requires unbundled access only to the incumbent LEC’s *existing* network – not to a yet unbuilt one.¹²

Put succinctly, Paragraph 53 of the *Advanced Services MO&O* may be only read to require ILECs to condition their facilities so that competitors may provide services which the ILEC itself provides and which the facilities in their *existing* state support. In contrast, the imposition of any “affirmative steps”¹³ requirement on ILECs would be nothing more than an attempt to resurrect the “superior in quality” network element rule¹⁴ which was unequivocally vacated by *Iowa Utilities Board*.¹⁵ As such Paragraph 53 is squarely in conflict with the Eighth Circuit’s mandate.

II. THE COMMISSION’S FORBEARANCE AUTHORITY UNDER SECTION 706 IS PLAINLY BROADER THAT, AND NOT SUBJECT TO THE SAME LIMITATIONS AS, SECTION 10.

Paragraphs 69-79 of the *Advanced Services MO&O* plainly misread the Commission’s authority under Section 706 of the Act. Specifically, these paragraphs

¹² *Iowa Utilities Board*, 120 F.3d at 812-13 (emphasis in original).

¹³ *Local Competition Order*, ¶ 382.

¹⁴ 47 C.F.R. § 51.311(c).

¹⁵ 120 F.3d at 812-13.

erroneously read into the particular language of Section 706 – which grants the Commission specific forbearance authority in order to stimulate the deployment of advanced services – a limitation existing in Section 10 – which is Congress’ general grant of forbearance authority. This fallacious reading is wrong for (at least) three reasons: *first*, the Section 10(d) limitation which the Commission reads into Section 706 is restricted, by its very terms, to the Congress’ Section 10(a) grant of forbearance authority, and therefore has no application to Section 706; *second*, Congress’ grant of forbearance authority in Section 706 is more specific than its general grant in Section 10, and under standard rules of statutory construction, the more specific language of Section 706 trumps any limitation set forth in the general language of Section 10; *third*, the Commission’s imposition of Section 10(d)’s limitation upon Congress’ specific Section 706 grant of forbearance authority would undermine the very purpose of Section 706 – an affirmative obligation to forbear from regulation in order to stimulate the deployment of advanced services.¹⁶

SBC is unquestionably correct that the *Advanced Services MO&O* “reflects a fundamental misunderstanding of sections 10 and 706.”¹⁷ The Section 10(d) limitation which the Commission imposes upon its specific Section 706 forbearance authority is restricted, by its very terms, to Section 10(a)’s general grant of forbearance authority. It therefore has no application to Section 706.¹⁸

¹⁶ This is not to suggest that this affirmative obligation arises solely from Section 706. See SBC petition, at 7.

¹⁷ SBC petition, at 6.

¹⁸ Since Section 10(d) specifically references only Section 10(a), it cannot be read

... [T]he Commission may not forbear from applying the requirements of section 251(c) or 271 of this title *under subsection (a) of this section* until it determines that those requirements have been fully implemented."¹⁹

Even if Section 10(d) were not unambiguous with respect to its limitation being restricted to Section 10(a)'s general grant of forbearance authority, the omission in Section 10(d) of *any reference* to Section 706 cannot be understood to be without meaning. Rather, this omission evinces specific congressional intent *not* to limit Section 706 in the same manner in which Section 10(a) is limited.

Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."²⁰

While the Commission is correct that it "must look to the structure and language of the statute as a whole"²¹ to divine congressional intent, the conclusion drawn by the *Advanced Services MO&O* is precisely the *wrong* one. There is no doubt that Section 706 is a *specific grant* of forbearance authority, in contrast to Section 10(a)'s *general grant*. As such, the specific grant of authority in Section 706 takes precedence over Section 10's general grant, including any limitation set forth in Section 10.²²

to apply to Section 706. The maxim of the law is ancient: *expressio unius est exclusio alterius*.

¹⁹ 47 U.S.C. § 160(d) (emphasis added).

²⁰ *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted; emphasis added).

²¹ *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 417 (1992); *Advanced Services MO&O*, ¶ 71.

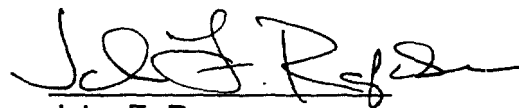
²² *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ([I]t is commonplace of statutory construction that the specific governs the general ...");

The Commission's imposition of Section 10(d)'s limitation on Section 706 also undermines the very purpose of Section 706. "[S]ection 706 gives the Commission an affirmative obligation to encourage the deployment of advanced telecommunications services by utilizing (among other tools) 'regulatory forbearance'."²³ This obligation cannot be avoided, either in whole or in part, by erroneously relying upon an inapplicable limitation set forth elsewhere in the statute. By eschewing its independent Section 706 forbearance authority, the Commission acts deliberately contrary to congressional direction.

III. CONCLUSION.

For the reasons stated above, the petitions of Bell Atlantic and the SBC companies are well taken and should be expeditiously granted.

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Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987).

²³ Bell Atlantic petition, at 6.

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Comments of GTE" have been mailed by first class United States mail, postage prepaid, on September 23, 1998 to all parties of record.



Ann D. Berkowitz